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Digging itself out of the hole? A critical assessment of the European Commission's attempt to revitalise State aid enforcement after the crisis

Dr Albert Sanchez-Graells¹

ABSTRACT

This paper aims to assess the likelihood that State aid enforcement can be revitalised in the post-crisis period as a result of the 2012-2014 State aid modernisation process (SAM). The paper takes the view that State aid enforcement was left in a difficult impasse as a result of the extraordinary measures the European Commission implemented during and immediately after the 2008 economic breakdown. These measures left the Commission in a difficult position due to the unavoidable concessions and lowering of standards that dealing with the soaring volume of State aid required. To overcome that situation, the Commission subsequently promoted procedural reforms as part of SAM, and is now praising a *State aid control 2.0* that it perceives to have solved the problem. This paper builds on the premise of the Commission's weakness as a result of the crisis-related changes in State aid enforcement to critically assess whether a scenario of stronger enforcement can be foreseen under the modernised *State aid control 2.0* and, particularly, in the post-SAM procedural framework. It pays particular attention to the need for the Commission to (re)engage in a more substantive assessment of aid measures and to promote judicial (or private) enforcement of State aid rules in an effective manner. It concludes that, in the absence of a fundamental rethink of the enforcement system, a revitalisation of State aid post-SAM is highly unlikely.

KEYWORDS

State aid, enforcement, State Aid Modernisation, SAM, *State aid control 2.0*, economic crisis, institutional design.

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H25, H71, K21, K23, K42

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“The crisis is changing the role of government in the economy, and I have seen these changes reflected in our control of State aid ... The public rescue and restructuring of ailing banks has determined a dramatic evolution in State aid policy and control.” J Almunia²

“... overall there is no clear feeling that compliance is high on the agenda. That worries me, because if the proportion of problematic cases remains this high, in a situation where we expect up to 90% of aid measures to come under the GBER, we can expect serious negative effects.” M Vestager³

1. Introduction

It is now common knowledge that the European Commission faced a gigantic wave of pressure during the early stages of the economic crisis, and that it had to take pragmatic solutions to keep the EU State aid control system afloat.⁴ The adoption of a temporary framework of State aid control⁵ allowed Member States to engage in multi-billion⁶ emergency bail-outs and resulted in a situation of procedural crisis⁷ whereby the Commission barely managed to keep track of the economic interventions in the financial sector (and elsewhere).⁸ Given the lasting effects of the economic crisis and the slowness of economic recovery, the Commission had to extend the validity of the extraordinary measures well beyond their initially intended 2-year duration.⁹ Throughout this period of exceptional “crisis-related” State aid measures, the concessions to the Member States in terms of relaxation of the pre-crisis rules were obvious, both in their substantive and procedural dimensions.¹⁰ The Commission tried to justify these measures (and their extension) through the effects they were deemed to generate in terms of economic recovery,¹¹ which are however far from clear cut.¹² In any case, it cannot be ignored that political pressures also played a very important role in shaping the ‘flexible and adaptive approach’ to State aid control during the financial crisis.¹³ The (unexpected?) relevance of State aid control in the crisis scenario put significant pressure on the system and threatened to break

² Speech “Developments in State aid policy” at the State Aid Round Table - BDI Berlin, 11 November 2011, ec.europa.eu/competition/speeches/index_theme_6.html.

³ Speech at High Level Forum of Member States, 18 December 2014, ec.europa.eu/commission/2014-2019/vestager/announcements/speech-high-level-forum-member-states-margrethe-vestager-commissioner-competition-18-december-2014_en.

⁴ R Luja, “State Aid and the Financial Crisis: Overview of the Crisis Framework” (2009) *EStAL* 145; P Nicolaides and IE Rusu, “The Financial Crisis and State Aid” (2010) 55 *Antitrust Bulletin* 759.

⁵ M Campo, “The new State aid temporary framework” (2009) *Competition Policy Newsletter* 1.

⁶ Between October 2008 and the end of 2009, the Commission approved around EUR 3.63 trillion (equivalent to 29% of the EU-27 GDP) of State aid measures to financial institutions; European Commission, *Report on Competition Policy 2009* (2010) 19, ec.europa.eu/competition/publications/annual_report/2009/en.pdf.

⁷ Cfr. P Werner and M Maier, “Procedure in Crisis? Overview and Assessment of the Commission’s State Aid Procedure during the Current Crisis” (2009) *EStAL* 177.

⁸ ec.europa.eu/competition/state_aid/scoreboard/financial_economic_crisis_aid_en.html#tables.

⁹ And, in any case, the “exit strategy” was never clear; Nicolaides and Rusu (n 4) 782.

¹⁰ For discussion, see DMB Gerard, “Managing the Financial Crisis in Europe: The Role of EU State Aid Law Enforcement”, in M Merola, J Derenne and J Rivas (eds), *Competition Law at Times of Economic Crisis - In Need for Adjustment?* (Brussels, Bruylant, 2013) 231.

¹¹ European Commission, Staff Working Paper, *The effects of temporary State aid rules adopted in the context of the financial and economic crisis*, SEC(2011) 1126 final, ec.europa.eu/competition/publications/reports/working_paper_en.pdf.

¹² See ÇB Tunali and J Fidrmuc, “State Aid Policy in the European Union” (2015) 53(5) *JCMS: Journal of Common Market Studies* 1143-1162.

¹³ Along these lines, see M Reynolds, S Macrory and M Chowdhury, “EU Competition Policy in the Financial Crisis: Extraordinary Measures” (2011) 33(6) *Fordham International Law Journal* 1670-737.

it at the seams; reopening the debate of whether State aid control is at all needed for the proper functioning of the internal market, or if the EU and the Member States would do better without.¹⁴ As this paper argues, there is a case to be made for a significant rethink of the system, particularly in view of its limited actual effectiveness despite efforts to invest more resources in State aid enforcement and focus the Commission's efforts in large(r) cases.

In that regard, it is worth stressing that beyond the minimal control of the emergency crisis-related interventions in the economy, in the 2008 to 2013 period, the effectiveness of State aid control of “non-crisis” measures was most likely diminished by the attention paid to the aid being funnelled to the financial sector, at least in the aftermath of the crisis, as well as the roll-over of the 2005 State Aid Action Plan,¹⁵ in particular as the extension of the scope of block exemptions is concerned. Generally, the Commission's procedures were considered insufficiently effective by the European Court of Auditors (ECA) in an audit exercise focused on the organisation and the decision-making and monitoring processes of the Commission during the period 2008 to 2010, which objective was to assess whether the Commission's procedures ensured effective management of State aid control.¹⁶ Remarkably, ECA found that *‘the Commission has made efforts to ensure that all relevant State aid cases are handled but its systems do not guarantee that all aid is captured’*.¹⁷ One of the main reasons for such assessment related to the increasing use of block exemption regulations (BER) coupled with insufficient *ex post* controls, which in ECA's view resulted in the Commission having insufficient assurance that it dealt with all relevant state aid cases and, ultimately, in *‘a risk of State aid going undetected’*.¹⁸ As an indicator of the magnitude and relevance of this trend of unchecked reliance on BER with insufficient *ex post* control for the enforcement of the “non-crisis” State aid rules, it is worth stressing that the number of “non-crisis” aid decisions for industry and services adopted by the Commission has been in steady decline since 2007 (down to 261 in 2013 from a 395 high in 2007), whereas the number of “crisis-related” decisions in the period 2008 to 2013 exceeded 450 decisions. Consequently, it seems rather straightforward that the prioritisation of “crisis-related” aid created some space for reduced effectiveness of the general rules. That trend is compounded by a very significant increase of notifications covered by the 2008 general block exemption regulation¹⁹ for the period 2008 to 2013, with an accumulated count of over 2,800 block-exempted measures under the 2008 GBER (see below §2 for further discussion on the absorption of resources by non-GBER crisis-related measures).

¹⁴ Like many others, this is a discussion that reappears recurrently in academic and policy debate. See *eg* C-D Ehlermann, “State Aid Control in the European Union: Success or Failure” (1994-1995) 18 *Fordham International Law Journal* 1212-29. For a recent critical perspective, see J Temple Lang, “EU State Aid Rules – The Need for Substantive Reform” (2014) *EStAL* 440-53.

¹⁵ European Commission, *State Aid action plan: Less and better targeted state aid: a roadmap for state aid reform 2005–2009*, COM(2005)107 final, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005DC0107>.

¹⁶ European Court of Auditors, *Do the Commission's Procedures Ensure Effective Management of State Aid Control?*, Special Report No 15 (2011) http://www.eca.europa.eu/lists/ecadocuments/sr11_15/sr11_15_en.pdf.

¹⁷ *Ibid*, executive summary, 7.

¹⁸ *Ibid*, para 96.

¹⁹ Commission Regulation (EC) 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty [2008] OJ L 214/3 (the 2008 GBER).

Focusing explicitly on the Commission's limited *ex post* assessment of compliance with BER requirements, the ECA expressed very clear concerns regarding the negative impacts that this trend can have on the overall effectiveness of State aid control. It is worth highlighting that

The Commission has recognised the increasing importance of *ex post* monitoring, as more and more measures are exempted from *ex ante* notification. However, its monitoring activity is limited to a yearly desk review of 15 approved aid schemes plus 15 block-exempted measures, selected judgmentally. This can only give an impression of the respect of the conditions set by the GBER and by the Commission decisions approving aid schemes [in footnote: 'As a comparison, in 2009, almost 1,000 block exemption measures were notified to the Commission *ex post* and more than 200 schemes were notified *ex ante*'].

The Commission's 2008 monitoring exercise found significant problems in 3 of the 30 cases examined. Furthermore the usefulness of this exercise was limited because the Commission was unable to check the individual grants under some of the selected schemes as no aid had yet been granted. It also had difficulties in obtaining the requested information from the Member States.²⁰

Of course, it is impossible to accurately estimate the actual effectiveness of the pre-crisis State aid enforcement system²¹ but, given that EU State aid rules always had significant limitations,²² it would also be unreasonable to claim that it was generally efficient. The ECA report mentioned above gives good reasons for this assumption and supports such general finding, particularly by identifying clear areas where the Commission does not check compliance with the applicable rules—either at all, as in the case of *de minimis* aid,²³ or in an effective manner, such as in relation with withdrawn aid notifications.²⁴ Despite the fact that the volume of non-financial aid that Member States were ready to distribute was constrained by the impact of crisis-related aid on public finances,²⁵ the amounts of illegal aid actually granted by Member States seemed to be rather high in proportional terms, and there is sufficient anecdotal evidence to support this view. Indeed, on the basis of the publicly available information, it does not seem exaggerated to estimate at around 100 billion Euros the amount of (non-investigated) illegally-granted State aid in the EU between 2008 and 2013.²⁶ Even more conservative estimates, of around 35 billion Euros for the same period, would still be deeply troubling.²⁷ If the same level of non- or incorrect compliance with EU State aid rules can be

²⁰ European Court of Auditors (n 16) paras 21 and 22.

²¹ For an attempt to summarise the debate in the area of regional aid, see P-P Combes and T van Ypersele, *The role and effectiveness of regional investment aid. The point of view of the academic literature* (2013) ec.europa.eu/competition/consultations/2013_regional_aid_guidelines/literature_review_study_en.pdf.

²² A Heimler and F Jenny, "The limitations of European Union control of state aid" (2012) 28(2) *Oxford Review of Economic Policy* 347-367.

²³ European Court of Auditors (n 16) para 25: '*in practice the Commission does not monitor the respect of the conditions for granting de minimis aid*'.

²⁴ *Ibid*, para 30.

²⁵ The proportion of crisis-aid to non-crisis aid is roughly of 10:1 during the 2008-2013 period.

²⁶ Assuming that Commissioner Vestager's recent statement (n 3) that "*there are 'issues' with nearly a third of all cases*" can be extended backwards to the period covered by the 2008 GBER, this would leave us with a rough estimate of about 100 billion Euro of unlawfully block exempted State aid between 2008-2013—based on the *Overview of State aid expenditure by category of aid (total aid by category of aid, in 2013 prices, 2008-2013)* ec.europa.eu/competition/state_aid/scoreboard/non_crisis_en.html. Of course, this is a very rough measurement and it could well be that the public message launched by the Competition Commissioners (Vestager and, earlier, Almunia) is inaccurate. However, there are no alternative public figures to be used.

²⁷ This would be the figure resulting from an assumption that the problematic cases are actually in the region of 10% of block-exempted aid, as could be inferred from the ECA's report, where it stresses that 'The Commission's 2008 monitoring exercise found significant problems in 3 of the 30 cases examined'; European Court of Auditors (n 16) para 22.

extrapolated to other schemes and aid not covered by existing block exemption regulations (BERs), the estimate of illegal State aid going undetected can probably be easily trebled (as block-exempted aid accumulated around one third of total aid in the period).

Even taking this unavoidable truth about the *structural inefficiency* of State aid control (particularly under the BER mechanism) into account and accepting that no perfect system of State aid control can be reasonably expected to exist in reality, there seems to be no doubt that the crisis further reduced whatever previous levels of effectiveness of non-crisis State aid control by absorbing a significant volume of decision-making activity during that period (see below §2). Such further erosion of State aid rules' effectiveness as a result of the economic crisis posed a significant threat for their continued enforcement.²⁸ This created a looming risk of no-return to pre-crisis enforcement levels,²⁹ which could have significant negative economic impacts.³⁰ The State Aid Modernisation (SAM)³¹ process undertaken by the Commission in 2012 was thus initiated, at least in part,³² as a strategy to overcome the difficult situation in which it found itself as a result of the temporary rules resulting from the crisis,³³ and as an attempt to ensure the relevance and effectiveness of the EU State aid control regime in the “post-crisis” scenario.

However, despite the Commission's efforts, such a risk of permanent erosion of the EU State aid system has eventually actualized and the “post-crisis” scenario that results from the SAM can hardly be considered equivalent to its pre-crisis predecessor.³⁴ Among other factors, the adoption of the “*clear now and assess later*” principle³⁵ as a fundamental procedural device used (and abused) to decompress the State aid control system during the crisis seems to have

²⁸ Generally, see TJ Doleys, “Managing the Dilemma of Discretion: The European Commission and the Development of EU State Aid Policy” (2013) 13(1) *Journal of Industry, Competition and Trade* 23-38.

²⁹ Werner and Maier (n 7) 185. T Jaeger, “How Much Flexibility Do We Need? Commission Crisis Management Revisited” (2009) *EStAL* 3, 5. Cfr. Luja (n 4) 159.

³⁰ B Lyons, *Competition Policy, Bailouts and the Economic Crisis* (2009), ssrn.com/abstract=1367688.

³¹ ec.europa.eu/competition/state_aid/modernisation/index_en.html.

³² It should be stressed that SAM was not solely about procedural economy. As the Commission stressed in its launch, the “*objectives of modernisation of State aid control are ... threefold: (i) to foster sustainable, smart and inclusive growth in a competitive internal market; (ii) to focus Commission ex ante scrutiny on cases with the biggest impact on internal market whilst strengthening the Member States cooperation in State aid enforcement; (iii) to streamline the rules and provide for faster decisions*”; European Commission, *Communication on EU State Aid Modernisation (SAM)*, COM(2012)209 final, para 8. Hence, the procedural aspects concern the last two goals. The rest of SAM was aimed at establishing a more economic and less formal approach to State aid evaluation, which was a relatively old claim; see D Hildebrand and A Schweinsberg, “Refined Economic Approach in European State Aid Control—Will it Gain Momentum?” (2007) 30(3) *World Competition* 449-62, and D Neven and V Verouden, “Towards a More Refined Economic Approach in State Aid Control”, in W Mederer, N Pesaresi and M van Hoof (eds), *EU Competition Law – Volume IV: State Aid* (Claeys & Casteels, 2008) ec.europa.eu/dgs/competition/economist/economic_approach_sa_control.pdf. For discussion of the specifics of the economic approach embedded in SAM, see JJ Piernas Lopez, *The Concept of State Aid under EU Law: From Internal Market to Competition and Beyond* (Oxford, OUP, 2015) 62 and ff.

³³ See C Quigley, QC, “The European Commission's Programme for State Aid Modernization” (2013) 20(1) *Maastricht Journal of European and Comparative Law* 35-55.

³⁴ For a critical assessment, see D Hildebrand, “Modernisation of State Aid Rules in the European Union. Application of Economic Concepts and Principles”, in S Schoenmaekers, W Devroe and N Philipsen (eds), *State Aid and Public Procurement in the European Union* (Cambridge, Intersentia, 2014) 1-18.

³⁵ Werner and Maier (n 7) 181-82.

taken root and permeated *all aspects* of the EU State aid regime.³⁶ Indeed, as a result of one of the procedural goals of SAM (*ie* to focus the Commission's *ex ante* scrutiny on cases with the biggest impact on the internal market whilst strengthening the Member States cooperation in State aid enforcement), the EU's *State aid control 2.0* is now being rebuilt on the *principle of "trust and verify"*³⁷ and reoriented towards self-assessment on the basis of *omnibus* block exemption regulations³⁸ and *ex post* evaluations.³⁹ The mantra chosen for such "reinvention" of EU State aid control is as follows:

The Commission is conducting a complete overhaul of its State aid rules. Following the principle of "trust and verify", the new rules massively cut red tape for less distortive aid measures thanks to more exemptions from prior notification to the Commission. At the same time, measures that may seriously harm competition or fragment the EU internal market will be subject to more careful scrutiny, monitoring and evaluation. This will allow the Member States and the Commission to promote "good aid" that fosters economic growth and other objectives of common interest, and to focus their scrutiny on the cases that matter.⁴⁰

Such approach to *State aid control 2.0* is fundamentally altering the balance of roles, duties and timing of intervention for both the Commission and the Member States, and reallocating very important responsibilities to the latter.⁴¹ One of the most recent Commission initiatives for the implementation of SAM invites Member States "*to present proposals for strengthening national systems to ensure better State aid compliance, not only through formal checks but also through pro-active assessment of national measures in fields such as tax and on sectors in need of restructuring*".⁴² It seems clear that *State aid control 2.0* is premised on devolution of functions to the Member States or, more plainly, their outsourcing (if not suppression, or at least transformation). This significantly undermines the fundamental premise that State aid control works on an *ex ante* basis and justifies the last bastion of Commission's enforcement monopoly in EU competition law: that of Article 108(3) TFEU.⁴³

³⁶ For an interesting discussion of its "process of resilience and adaptation", see A Biondi and E Righini, "An Evolutionary Theory of EU State Aid Control", in A Arnall and D Chalmers, *The Oxford Handbook of European Law* (Oxford, OUP, 2015), ssrn.com/abstract=2499579.

³⁷ European Commission, "New rules on rescue and restructuring aid for industry: the right incentives for innovation and growth" (2014) 9 *Competition policy brief* 1.

³⁸ Speech by H Ungerer, "After the State Aid Action Plan – the EU's new State Aid framework" at the EU State Aid Summit held in Brussels, 23-24 June 2009, ec.europa.eu/competition/speeches/text/sp2009_11_en.pdf.

³⁹ Commission Staff Working Document, *Common methodology for State aid evaluation*, SWD(2014) 179 final, ec.europa.eu/competition/state_aid/modernisation/state_aid_evaluation_methodology_en.pdf.

European Commission, "You can't improve what you can't measure: State aid evaluation" (2014) 7 *Competition policy brief* 1. See also C Buts and M Jegers, "Ex Post Evaluation of State Aid", in S Schoenmaekers, W Devroe and N Philipsen (eds), *State Aid and Public Procurement in the European Union* (Cambridge, Intersentia, 2014) 33-46.

⁴⁰ European Commission (n 37) 1. With the exact same mantra on the fundamentals of *State aid control 2.0*, see European Commission (n 39) 1. See also European Commission, "Guidelines on Regional state aid for 2014-2020" (2014) 14 *Competition policy brief* 1.

⁴¹ For general discussion on the risks and difficulties of such approach to the enforcement of a regulatory regime such as State aid, see A Buijze, "Shared Regulatory Regimes through the Lens of Subsidiarity: Towards a Substantive Approach" (2014) 10(5) *Utrecht Law Review* 67-79.

⁴² European Commission, Press release IP/14/2783, "State aid: Commission turns state aid modernisation into action and calls for better cooperation with Member States to boost growth", 18 December 2014, europa.eu/rapid/press-release_IP-14-2783_en.htm.

⁴³ For some critical remarks, see T Lübbig and T Morgan, "State Aid, National Courts and the Separation of Powers: Should Judges be Bound to the European Commission's Unfinished State Aid Business?" (2014) 5(5) *Journal of European Competition Law & Practice* 256-60. See also A Sanchez Graells, "CJEU toys with the one

The economic crisis seems to have deeply transformed the EU State aid control system and to have left the Commission largely holed-up in a SAM paradigm of self-assessment and compliance by the Member States, coupled with *ex post* evaluation overseen by the Commission—except in relation to a very limited number of large cases, where the Commission is willing to deploy more resources (or being, “*bigger and more ambitious on big things, and smaller and more modest on small things*”).⁴⁴ Thus, this area of EU competition law is shifting ever more clearly towards an enforcement architecture parallel to that of *antitrust prohibitions* after the modernisation carried out by Regulation 1/2003.⁴⁵

The two main problems with such evolution, though, are that (a) SAM has not included a decentralisation of the enforcement of EU State aid rules in a way that allows for their proper judicial (or private) enforcement,⁴⁶ and (b) that Member States operate in a fundamentally different way than undertakings⁴⁷ and are subject to a significantly more limited number of oversight mechanisms (*ie* other than through the Commission, to date, there is no other relevant alternative State aid enforcement route with full powers of review). Consequently, a State aid control system based on (i) very limited or no *ex ante* control by the Commission [which aims to funnel 90% of aid through the 2014 general block exemption regulation (2014 GBER)];⁴⁸ (ii) self-assessment and (voluntary) compliance by Member States;⁴⁹ and (iii) *ex post* evaluation by the Member States themselves,⁵⁰ then overseen by Commission—possibly leading to infringement procedures, at least in cases of glaring infringement of the EU State aid rules—is bound to fail.⁵¹ Not least due to the lack of (negative) incentives linked to the

stop shop approach and muddies the waters of State Aid analysis (C-284/12)”, *howtocrackanut*, 21 November 2013, howtocrackanut.blogspot.co.uk/2013/11/cjeu-toys-with-one-stop-shop-approach.html.

⁴⁴ Speech by J-C Juncker, “A New Start: European Commission work plan to deliver jobs, growth and investment” in Strasbourg, 16 December 2014, europa.eu/rapid/press-release_IP-14-2703_en.htm. See also T Lyons QC, “State Aid Modernisation and Recent Cases – A Changing World?”, 29 April 2015, 39essex.com/content/wp-content/uploads/2014/11/Modernisation-of-State-Aid-Timothy-Lyons-QC.pdf.

⁴⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty [2004] OJ L 1/1.

⁴⁶ For discussion, see N Fiedziuk, “Towards Decentralization of State Aid Control: The Case of Services of General Economic Interest” (2013) 36(3) *World Competition* 387-408. See also A Sanchez Graells, “Enforcement of State Aid Rules for Services of General Economic Interest before Public Procurement Review Bodies and Courts” (2015) 10(1) *Competition Law Review* 3-34.

⁴⁷ M Blauberger, “State Aid Control from a Political Science Perspective”, in E Szyszczak (ed), *Research Handbook on European State Aid Law* (Cheltenham, Edgar Elgar, 2011) 28-43.

⁴⁸ Commission Regulation (EU) N°651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1.

⁴⁹ This seems to be the “preferred” approach under the Commission’s loose interpretation of SAM as “*new provisions ... supported by higher agreed standards of transparency and accountability of state aid. These common standards will be ensured by Member States in close partnership with the Commission*” (emphasis added); “State aid modernisation-a major revamp of EU state aid control” (2014) 11 *Competition policy brief* 1.

⁵⁰ “*The Member States will have more responsibility for designing and implementing schemes without prior notification, and putting efficient checks in place at national level (which can be achieved through appropriate institutional set-up and for which many Member States are stepping up their efforts)*” (emphasis added); *ibid*, 3.

⁵¹ Along the same lines, stressing that “*the State Aid Modernisation paper seems to me to be a most inadequate response to the undoubted need for modernisation*”, among other reasons, because the Commission’s acknowledgement of Member States’ maladministration of the 2008 GBER “*makes all the more surprising that the State Aid Modernisation paper appears to contemplate some devolution of administration of the rules*”, J Lever, QC, “EU State Aid Law – Not a Pretty Sight” (2013) *EStAL* 5, 5-6.

infringement of EU State aid rules,⁵² the difficulties traditionally linked to recovery of unlawful and incompatible State aid,⁵³ as well as the practical impossibility of restoring the competitive conditions that existed prior to the illegal State aid. Furthermore, the compounded institutional difficulty is that, even if full decentralisation was to be implemented,⁵⁴ its non-judicial effectiveness would probably not increase because national competition authorities remain in a weak situation when it comes to State aid control against their State (see discussion below §4).

In view of all this, in my opinion, Commissioner Vestager's worries that in such a paradigm "*we can expect serious negative effects*" if Member States do not rank State aid self-assessment and compliance higher in their (economic) agendas is a gross understatement, even in political terms.⁵⁵ It seems unrealistic to expect Member States (or all of them; or under any circumstances) to self-regulate in this area and voluntarily comply with State aid rules.⁵⁶ By implication, if the Commission does not find an effective way to dig itself out of the SAM hole, the EU State aid control system will continue diminishing its effectiveness,⁵⁷ perhaps to the point that it may as well be dismantled.⁵⁸

With these considerations on the background, this paper aims to explore the path that led the Commission to the bottom of the SAM hole (§2), and to assess the likelihood that it can dig itself out by revitalising State aid enforcement in the post-crisis period (§3). It pays particular attention to the need for the Commission to (re)engage in a more substantive assessment of aid measures and to promote judicial (or private) enforcement of State aid in an effective manner. On that point, the paper critically assesses the potential for a truly decentralized State aid system akin to the one existing under Regulation 1/2003 for *antitrust* enforcement, which is certainly more limited than a cursory comparison could suggest (§4). The paper concludes with some general remarks and issues open to further research (§5).

⁵² P Nicolaides, "Control of State Aid in the European Union Compliance, Sanctions and Rational Behaviour" (2002) 25(3) *World Competition* 249-262.

⁵³ Indeed, effective recovery of State aid is very difficult to achieve. Only 52% of illegal and incompatible aid was recovered in the period 2004-14, whereas 36% was still outstanding and 12% was permanently lost in bankruptcy, ec.europa.eu/competition/state_aid/studies_reports/situation_recovery.jpg. Those difficulties are even more significant in a crisis, see L Hancher, "State Aid Recovery – A New Public Order" (2013) *EStAL* 1.

⁵⁴ For an alternative institutional proposal, see P Nicolaides, "State Aid Modernization: Institutions for Enforcement of State Aid Rules" (2012) 35(3) *World Competition* 457-69.

⁵⁵ Above (n 3).

⁵⁶ For an overview of the diversity of approaches to State aid compliance amongst several Member States, see C Buts, T Joris and M Jegers, "State Aid Policy in the EU Member States: It's a Different Games They Play" (2013) *EStAL* 330.

⁵⁷ The (perceived) lack of effectiveness of the system from SAM has led to a proposal to criminalise breaches of State aid rules, see C Koenig and J Lindner, "Criminal Liability—An Efficient Tool of EU State Aid Law Enforcement?" (2015) 1 *EStAL* 19. This should at least be taken as a warning on the diminishing regard for State aid rules and the need to revamp the system. I am personally not convinced that criminal liability should be the chosen regulatory tool though. The reasons exceed the scope of this paper.

⁵⁸ It should not be taken for granted that State aid rules will be fit for purpose indefinitely and, at some point, the system may be dismantled. Along similar lines, Lever (n 51) has advocated for a minimisation of EU State aid rules. The opposite process has generally been assumed to follow from EU State aid rules, though; see J Rocabert, "The choice of policy dismantling strategies: the effect of EU policy" (2014) *Proceedings of the 23rd IPSA World Congress of Political Science*, paperroom.ipsa.org/papers/paper_33108.pdf.

2. How did the Commission get holed-up in SAM?

The general reasons for the post-crisis SAM scenario have been outlined above. However, to get a better grasp of the dimensions of the shift in enforcement activity of the State aid rules by the Commission in the period 2008-2013, it is worth looking at some statistics.⁵⁹ As shown in Table 1, the non-crisis enforcement activity of the Commission shows a downward trend of decisions accompanied by a clear increase in block-exempted measures, particularly in the three years following the entry into force of 2008 GBER.⁶⁰ This shows an underlying trend of reduction of ‘direct’ enforcement activity by the Commission, which was the purpose of the approval of the 2008 GBER.⁶¹ However, the boom of crisis-related cases, particularly in 2009 and 2010, certainly absorbed a significant volume of the Commission’s decision-making capabilities (of around 30% of the increased decision volume, or 45% of the pre-crisis volume). There seems to be a time lag of one year between the increase of crisis-aid decisions and the drastic reduction of non-crisis aid decisions but, as would be expected, it seems clear that the prioritisation of crisis-aid cases resulted in a significant reduction of non-crisis aid control of around 120 cases per year since 2010, whereas the reduction on notifications has been more limited. This has had an effect on the continued accumulation of a backlog of cases pending decision by the Commission, which is slightly below 450 for the period between 2008 and 2013—coincidentally, the number of crisis-aid decisions adopted.⁶²

Table 1. State aid enforcement statistics 2007-2013

| | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 |
|---|------|------|------|------|------|------|------|
| Non-crisis aid | | | | | | | |
| Notifications* (1) | 451 | 416 | 428 | 340 | 316 | 345 | 393 |
| Decisions (industry and services) (2) | 395 | 384 | 358 | 266 | 272 | 260 | 261 |
| Decisions (if by type)** | 403 | 391 | 362 | 270 | 276 | 267 | 269 |
| “Pre-2008 GBER” Block-exempted Measures | 465 | 375 | - | - | - | - | - |
| 2008 GBER Block-exempted Measures | - | 194 | 969 | 469 | 406 | 416 | 349 |
| Total “GBER” Block-exempted measures*** | 465 | 569 | 969 | 469 | 406 | 416 | 349 |
| Crisis-aid | | | | | | | |
| Decisions**** (3) | - | 25 | 166 | 110 | 78 | 66 | 44 |
| Combined crisis and non-crisis | | | | | | | |
| Total ‘direct’ decisions (2) + (3) | 395 | 409 | 524 | 376 | 350 | 326 | 305 |
| Crisis-aid decisions (%) | - | 6% | 32% | 29% | 22% | 20% | 14% |
| Non-crisis aid decisions (%) | 100% | 94% | 68% | 71% | 78% | 80% | 86% |
| Estimated backlog***** (1) – (2) | 56 | 32 | 70 | 74 | 44 | 85 | 132 |
| Estimated accumulated backlog | 56 | 88 | 158 | 232 | 276 | 361 | 493 |

⁵⁹ 2007 is used as the last “crisis-free” year for these purposes. European Commission’s State aid scoreboard data is only available for completed years up to 2013 at the time of writing.

⁶⁰ Indeed, in 2012 the block exempted measures represented 58% of all communicated aid measures, which in turn represented 32% of the value of the aid communicated; European Commission (n 49) 2.

⁶¹ This was expected, as the GBER “nearly tripled the number of block exempted measures compared to the previous regulations. ... substantially increased the aid intensities and notification ceilings for a series of aid measures covered by the previous regulations... higher amounts of SME investment aid, training aid, and employment aid ... can be granted than before”. Commission, General Block Exemption Regulation (GBER) Frequently Asked Questions, ec.europa.eu/competition/state_aid/legislation/gber_practical_faq_en.pdf.

⁶² It is difficult to make much sense of the accumulated backlog, given that delays in the assessment of State aid measures notified by Member States can trigger authorisation if the Commission does not assess them within specified time-limits; see Articles 4(6) and 7(7) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1999] OC L 83/1. However, it offers some indication as to the compounded effect of the Commission’s shortage of decision-making capacity.

Source: own calculations based on the data published in the State Aid Scoreboard 2014 and the State aid statistics (State of play: 19 November 2013) and other webpages of DG COMP. * Withdrawn notifications have been deducted. Only includes notifications to DG COMP. ** For some reason, the numbers differ when the Commission offers the statistics per type of decision. *** “Pre-2008 GBER” Block-exempted measures accumulated measures exempted under the three BERs for SME, training and employment aid that were recast into the 2008 GBER. **** Own elaboration based on the information retrieved from DG COMP case finder, as decisions under “notified aid” with the main objective “remedy for a serious disturbance in the economy”. The total is of 489 decisions, whereas the information provided by the Commission indicates “more than 450”.⁶³ Hence, even if there can be some minor deviations in the specific numbers for each year, the figures can be considered relevant. ***** Assumes that all crisis-related aid notifications were decided within the same year. Given that the turn-around for those decisions was usually of only one or two working days, particularly at the beginning of the period, this assumption seems sensible and, in any case, variations in terms of accumulated backlog for this reason alone should be minimal.

Figure 1 shows that the volume of ‘direct’ decision-making activity required from the Commission peaked in 2009 and the general downward trend derived from the approval of the 2008 GBER was delayed during the period 2008-2010. However, there is generally a clear reduction in the total volume of ‘direct’ enforcement activity by the Commission, which nonetheless left a significant backlog of around 500 cases since 2007.

Figure 1. Number of Decisions and Backlog 2007-2013

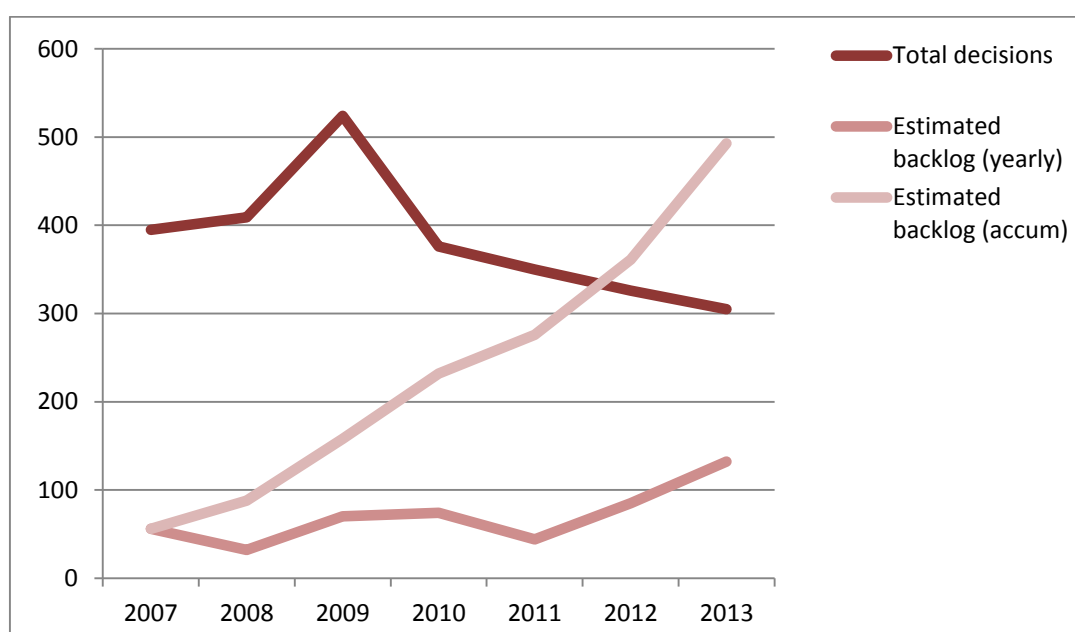
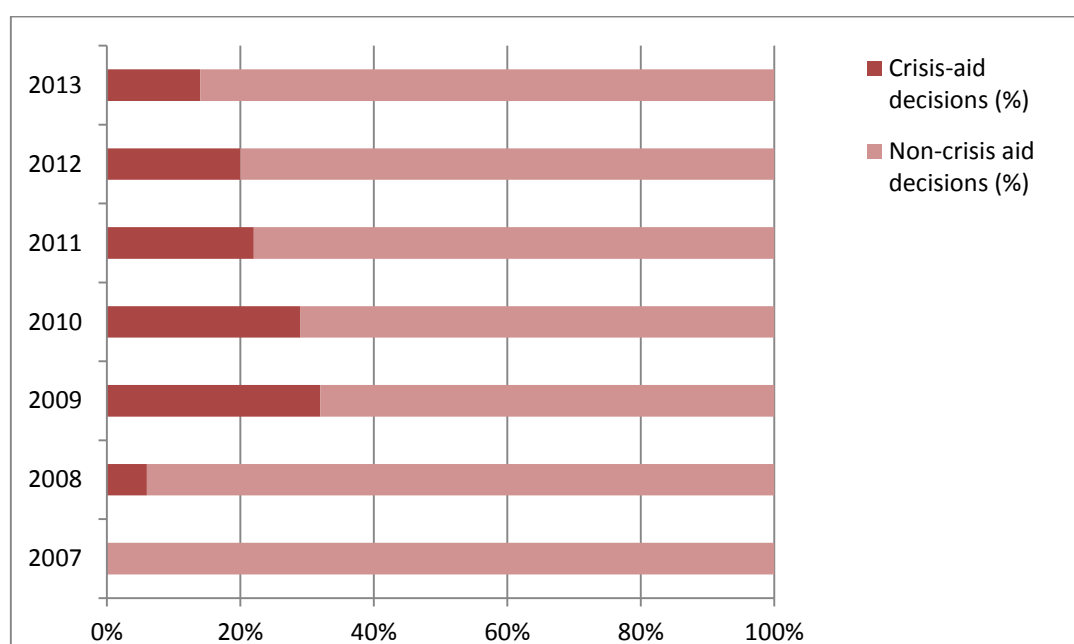


Figure 2 offers more detail on the absorption of decision-making capacity by crisis-aid during the period 2008-2013, and shows a clear deviation of resources towards urgent crisis-aid related decision-making, which peaked in 2009 (at around 32% of the total) but still remains at a considerable level in 2013 (15% of total).

⁶³ G Adamczyk and B Windisch, “State aid to European banks: returning to viability” (2015) *Competition State Aid Brief* 1, ec.europa.eu/competition/publications/csb/csb2015_001_en.pdf.

Figure 2. % of crisis-aid and non-crisis aid decisions 2007-2013



Overall, this cursory statistical analysis shows that, whatever additional resources the Commission could muster or reallocate to State aid enforcement during the crisis; they were insufficient to absorb the additional workload created by the temporary framework and the Member States high-level of intervention in the economy. It is worth looking at this issue in more detail, as the Commission actually raised its human resources dedicated to State aid enforcement significantly.

The information provided in DG COMP's annual activity reports shows that the evolution of the permanent and external personnel dedicated to State aid enforcement went from 168 members of staff in 2007 to 258 members of staff in 2010 and 2011.⁶⁴ This was achieved through two consecutive increases of more than 25% of individuals in 2009 and 2010, for an overall increase of the State aid task force of 53.5% during the 2007 to 2011 period. Moreover, a Task Force Financial Crisis (TFFC) was created in 2007 to deal exclusively with financial crisis-aid cases. Table 2 shows a simple estimate of the decision-making activity of these human resources in terms of decisions per member of staff assigned to State aid enforcement.

Table 2: Decision-making activity per member of staff 2007-2013

| | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 |
|--|------|------|------|------|------|------|------|
| Decisions (industry and services) (1) | 395 | 384 | 358 | 266 | 272 | 260 | 261 |
| Crisis-aid decisions (2) | - | 25 | 166 | 110 | 78 | 66 | 44 |
| Total 'direct' decisions (1) + (2) (a) | 395 | 409 | 524 | 376 | 350 | 326 | 305 |
| "GBER"-Exempted Measures (b) | 465 | 569 | 969 | 469 | 406 | 416 | 349 |
| Overall activity (a) + (b) = (c) | 860 | 978 | 1493 | 845 | 756 | 742 | 654 |
| Estimated backlog (d) | 56 | 32 | 70 | 74 | 44 | 85 | 132 |

⁶⁴ The intermediate figures are 168 (2007), 160 (2008), 202 (2009), 258 (2010) and 258 (2011). Unfortunately, the same information is not available for 2012 and 2013. The reports are accessible at ec.europa.eu/dgs/competition/index_en.htm. Overall, then, it seems that human capital was increased in more than +25% in both 2009 and 2010. That did not translate in an equal increase in decisions adopted, though.

| | | | | | | | |
|--|------|------|------|------|------|------|------|
| Total members of State aid staff (e) | 168 | 160 | 202 | 258 | 258 | 258* | 258* |
| Task Force Financial Crisis [TFFC] members (f) | 37** | 37** | 37** | 37** | 37** | 37** | 37** |
| Non-TFFC State aid staff members (e) – (f) = (g) | 131 | 123 | 165 | 221 | 221 | 221 | 221 |
| Crisis-decisions per TFFC member (2)/(f)*** | 0.0 | 0.7 | 4.5 | 3.0 | 2.1 | 1.8 | 1.2 |
| Non-crisis decisions per non-TFFC staff (1)/(g) | 2.4 | 2.4 | 1.8 | 1.0 | 1.0 | 1.0 | 1.0 |
| ‘Direct’ decisions per member of staff (a)/(e) | 2.4 | 2.6 | 2.6 | 1.5 | 1.4 | 1.3 | 1.2 |
| “GBER”-Exempted Measures p. m. s. (b)/(e) | 2.8 | 3.6 | 4.8 | 1.8 | 1.6 | 1.6 | 1.4 |
| Overall activity per member of staff (c)/(e) | 5.2 | 6.1 | 7.4 | 3.3 | 2.9 | 2.9 | 2.5 |
| Estimated backlog per member of staff (d)/(e) | 0.3 | 0.2 | 0.3 | 0.3 | 0.2 | 0.3 | 0.5 |
| Estimated accumulated backlog p. m. s. | 0.3 | 0.6 | 0.8 | 0.9 | 1.1 | 1.4 | 1.9 |

Source: own calculations based on the data published in the State Aid Scoreboard 2014, the State aid statistics (State of play: 19 November 2013), the annual activity reports 2007-2013 and other webpages of DG COMP. * For the purposes of the productivity calculations in the text, and given a shortage of direct data, it is assumed that the figure of 258 remained for 2012 and 2013. ** The “Task Force Financial Crisis” was created in 2007⁶⁵ and has been in charge of dealing with financial crisis measures only. It is assumed that its current membership⁶⁶ has been constant since its creation, but there is not publicly available information to double-check this. *** This number can be slightly lower, particularly in 2009, given that the TFFC only dealt with financial-crisis measures and not with crisis measures addressed to the “real economy”. However, there is no public information that allows for a decoupling of this information. In any case, given that crisis-aid to the real economy was extremely limited (except for Germany in 2009-10),⁶⁷ the overall picture should not be distorted by this imprecision.

The figures in Table 2 are hard to interpret without more qualitative information—particularly because the nature and complexity of the activities taken into account probably makes them rather unequal, which makes them difficult to aggregate. Certainly, processing a notification of block-exempted aid does not require the same level of effort than completing a file on either a non-crisis or a crisis-related individual notification, even if it does not lead to an in-depth investigation. Moreover, financial crisis-aid cases can require very intense monitoring during their implementation phase, which demand for human capital does not show in the figures included in Table 2. And, finally, crisis-aid general schemes may also have peculiarities of their own. Nonetheless, in my view, some rough trends are identifiable in the data, even if taken with a pinch of salt.

Firstly, the level of non-crisis decisions per member of non-TFFC staff has shown a persistent decline since 2008. The explanation for such decline is probably a mix of the effect of the 2008 GBER, which reduced the need for individual decisions, and the reassignment of decision-making capacity to crisis-aid cases (not solely within the TFFC). However, such decline has not resulted in the absorption of the backlog per member of staff, which fluctuates year on year. The estimated accumulated backlog now approaches the equivalent of two years’ worth of decision-making activity, which seems rather significant.

Secondly, the number of crisis-aid decisions per TFFC member has followed a trend that roughly matches the cycle of the economic crisis and peaked in 2009, which clearly put significant stress on the members of staff dealing with that specific type of State aid cases.

Thirdly, however, the combination of the ‘direct’ crisis-aid and non-crisis decisions per member of staff (both TFFC and non-TFFC) remained relatively stable in 2007 to 2009, and after the staff expansion in 2010, it reduced to about 50% of the pre-crisis level. This seems to support the hypothesis that crisis-aid absorbed a significant number of resources previously

⁶⁵ D Geradin, A Layne-Farrar and N Petit, *EU Competition Law and Economics* (Oxford, OUP, 2012) 5.17.

⁶⁶ As available at europa.eu/whoiswho/public/index (information retrieved on 29.07.2015).

⁶⁷ See ec.europa.eu/competition/state_aid/scoreboard/financial_economic_crisis_aid_en.html, where the data on State aid granted under the temporary framework to the real economy shows that only 82.9 bn Euro (or 0.0019% of the 2012 EU-27 GDP) was channelled under this non-financial crisis-aid vehicle.

dedicated to non-crisis aid, at least in 2008 and 2009, but that the Commission still has managed to reduce the number of ‘direct’ State aid decisions needed, particularly as a result of the 2008 GBER.

On that note, the picture regarding the overall level of activity is slightly more difficult to interpret when interventions related to ‘direct’ decision-making and block-exempted aid are combined. It could be argued that such an overall assessment cannot be carried out because the level of activity triggered by notifications of block-exempted aid is different, and probably more limited, than that triggered by individual notifications. However, given that block-exempted measures have become increasingly complex and that most of the individual decisions do not prompt the Commission to raise objections, the figures can be considered roughly homogeneous.⁶⁸ In any case, given that the absolute numbers are not important, but simply show a trend, it is submitted that the figures in Table 2 show that the combined effect of the entry into force of the 2008 GBER and the temporary framework significantly raised the level of activity per member of staff assigned to State aid cases in 2009 as compared to 2007. However, after the expansion in human resources implemented to tackle the demands of crisis-aid cases, the overall level of activity per member of staff was significantly reduced and has remained substantially below pre-crisis level. This suggests that the 2008 GBER managed to free up resources engaged in State aid clearance pre-crisis. And this is likely to be boosted even further with the adoption of the 2014 GBER (below §3). On the whole, however, it looks like, despite the expansion of 53.5% of the State aid task force between 2007 and 2013,⁶⁹ and the growing recourse to block-exempted measures, the Commission still struggles to keep pace with its State aid docket.

At any rate, and regardless of the accuracy of the previous conjectures and general trends, the situation in 2011 showed a converging trend of reduced total decisions, increasing backlog and increasing number of block-exempted measures notified by the Member States. Not surprisingly, this is strikingly similar to the situation the Commission faced concerning *antitrust* exemption decisions prior to the adoption of Regulation 1/2003.⁷⁰ Consequently, it also seems consistent with institutional history and the overall design of enforcement architecture for the Commission to have attempted to find a way out in a relatively similar manner through SAM. Nonetheless, as mentioned, there are fundamental differences between the modernisation of *antitrust* enforcement under Regulation 1/2003 and that of State aid rules after SAM, which begs the question of the effectiveness that such approach to State aid

⁶⁸ Given that around 90% of the ‘direct’ decisions result in the consideration that there is no aid or that there are no objections to be raised, this assumption seems reasonable. The specific figures are 88% (2007), 88% (2008), 91% (2009), 93% (2010), 89% (2011), 90% (2012) and 94% (2013). State aid statistics (State of play: 19 November 2013). ec.europa.eu/competition/state_aid/statistics/statistics_en.html. Of course, if that was not the case, the actual workload or volume of activity of the members of staff of the Commission assigned to State aid would have reduced significantly during the crisis period, which does not seem plausible.

⁶⁹ Please note that a contraction in 2012 and 2013 is possible, but no data is available.

⁷⁰ DJ Gerber, “Two Forms of Modernization in European Competition Law” (2007) 31(5) *Fordham International Law Journal* 1235, 1239 and ff. See also F Marcos and A Sanchez Graells, “A Missing Step in the Modernisation Stairway of EU Competition Law – Any Role for Block Exemption Regulations in the Realm of Regulation 1/2003?” (2010) 6(2) *Competition Law Review* 183-201.

enforcement can achieve. The extent to which the SAM system can result in a revitalised enforcement of State aid rules in the EU will be discussed below.

3. Can State aid enforcement be revitalised within the SAM paradigm?

As mentioned (above §1), the result of SAM is a system whereby the Commission is reorienting its State aid enforcement activities, which it is reshaping around the *principle of “trust and verify”*. SAM results in minimised *ex ante* intervention, ‘trust’ (*rectius*, hope) in Member States’ self-assessment and compliance with the State aid rules, and oversight of their own *ex post* evaluations.⁷¹ Such a strategy has the “*purpose ... to further reduce the administrative burden for public authorities and companies, and focus the Commission's resources on enforcing state aid rules in cases with the biggest impact on the Single Market [which] is an important objective of the Commission's State Aid Modernisation (SAM) initiative*”.⁷² Hence, the Commission is *migrating* from the ‘traditional’ system of State aid enforcement based on *ex ante* notifications of aid by Member States towards a *State aid control 2.0* that fundamentally relies on a minimisation of its actual (substantive) assessment of State aid measures and a development of new tools and procedures for the *ex post* evaluation of the aid schemes implemented by the Member States.

In my view, such *State aid control 2.0* is bound to be much more formalistic, raise the cost of compliance with State aid rules for the Member States, and have very limited (if any) teeth when it comes to the prevention of competition distortions derived from selectively granted economic advantages. Hence, it is highly unlikely, if at all possible, that the Commission manages to revitalise State aid control within the SAM paradigm. The following are some sketches of the main reasons for this assessment.

3.1. Lack of substantive assessment of State aid measures

In a majority of cases, the Commission is now avoiding any *ex ante* assessment by means of a very broad 2014 GBER, which is expected to cover 90% of State aid given in the EU in the very near future. The success of this regulatory strategy is almost guaranteed in view of the fact that, due to the more demanding character and complexity of the new state aid guidelines, ‘*Member States are more likely to use the 2014 GBER than its 2008 equivalent, not because it is more user-friendly, but because the opportunity cost of not using it has increased significantly*’.⁷³ This lack of *ex ante* analysis⁷⁴ is coupled with a restriction of the *ex post* substantive assessment of the State aid measures (self-)declared as (temporarily) block exempted by the Member States. If the relevant transparency obligations are complied with (see below §3.3), at least in the case of aid schemes with a large budget as defined by Article 1(2)(a) of the 2014 GBER, the Commission’s *ex post* oversight activity will be limited to the

⁷¹ R Planck, “Modernisation of State aid block exemptions” (2014) 12(3) *ZWeR* 271-81.

⁷² Commission, “State Aid: Commission gives guidance on local public support measures that can be granted without prior Commission approval”, 29 April 2015, europa.eu/rapid/press-release_IP-15-4889_en.htm.

⁷³ P Nicolaidis, “An Economic Assessment of the Usability of the New General Block Exemption Regulation for State Aid (Regulation 651/2014)” (2014) 10(3) *European Competition Journal* 403-17.

⁷⁴ Which is substituted with a relatively prescriptive list of conditions for each type of State aid measure in the 2014 GBER and, ultimately, left to Member States’ self-assessment or willingness to comply with them.

evaluation plan notified by the Member State and approved by the Commission [rec (8) and art 2(16) 2014 GBER].⁷⁵ Regardless of its justification, such lack of *ex ante* (and, to a large extent, even *ex post*) substantive assessment of the aid schemes that Member States consider covered by the 2014 GBER makes the likelihood that the system is reduced to a formal, box-ticking exercise very significant, which would reduce the actual effectiveness of State aid control even further.⁷⁶ Moreover, the Commission seems to have already assumed that block-exempted aid is of low priority in terms of oversight and investigation, which makes it very unlikely for it to effectively engage in a proper audit of the activity conducted by the Member States under the appearance of compliance with the 2014 GBER and, much less, for it to be able to uncover in an effective manner a significant number of instances of undue application of the rules—which could eventually lead to a withdrawal of the block exemption under Article 10 of the 2014 GBER.⁷⁷

Moreover, even if the Commission had that oversight capacity (which it does not), it is hard to see what benefits could derive from substituting an *ex ante* administrative procedure for authorisation with an *ex post* administrative procedure for withdrawal of the block exemption. On the contrary, at least two major drawbacks are immediately apparent. Firstly, it is very hard, if at all possible, to reverse the effects of illegal aid that has already been made available to its beneficiaries and, consequently, a State aid enforcement system based on *ex post* intervention is bound to be of limited effectiveness. Secondly, the Commission will most likely not have the upper hand in withdrawal procedures where Member States (and beneficiaries) are likely to raise important issues related to due process guarantees and good administration duties that can limit the Commission's leeway.⁷⁸ It is generally accepted that the principle of legal certainty is one of the general principles recognised in the EU legal order,⁷⁹ and that this principle and the corollary protection of legitimate expectations are binding on the Member States and the EU Institutions when they implement EU rules.⁸⁰ Nonetheless, the traditional position in this area has been to consider that 'there is no legitimate expectation to be protected in the field of State aid so as to trump the application of Article 107(1) TFEU'.⁸¹ This has been repeatedly criticised as an inconsistency in the development of

⁷⁵ The Commission ultimately relies on the fact that a failure to agree on an evaluation plan can trigger an obligation to discontinue the State aid scheme; see Article 1(2)(a) 2014 GBER. However, in my view, this is a relatively circular argument, given that the Commission cannot but rely on the information provided by the Member State itself. In any case, this is still a very novel mechanism and only 5 decisions approving evaluation plans have been adopted at the time of writing (29.07.2015). Therefore, the effectiveness of this mechanism will have to be reassessed in the future, on the basis of fuller empirical evidence.

⁷⁶ Particularly if Member States err, or act strategically, in the self-assessment of compliance with the conditions of the GBER, which the Commission has very limited resources to double-check.

⁷⁷ Anecdotally, it is interesting to stress that the Commission is yet to create an "Article 10" category of decisions for the purposes of its statistical publications, which seems to indicate that they are not a 'relevant' category in terms of total decisions. See http://ec.europa.eu/competition/state_aid/statistics/statistics_en.html.

⁷⁸ Indeed, this argument is frequently raised in State aid litigation before the EU Courts. For a recent example, see Opinion of AG Whatelet in *A2A SpA v Agenzia delle Entrate*, C-89/14, U:C:2015:211, paras 44 to 53. However, the AG Whatelet rejected the arguments on the basis of reasons similar to those criticised in the main text.

⁷⁹ *ISD Polska and Others v Commission*, C-369/09 P, EU:C:2011:175, para 122.

⁸⁰ *Gereken and Procola*, C-459/02, EU:C:2004:454, paras 21 to 24.

⁸¹ However, this is not warranted upon closer examination of the case law, as demonstrated by A Giraud, "A study of the notion of legitimate expectations in State aid recovery proceedings: 'Abandon all hope, ye who enter here'?" (2008) 45(5) *CMLRev* 1399-1431.

the principle of legal certainty and its corollary, the protection of legitimate expectations, in the area of EU State aid law as compared to general EU law.⁸² Furthermore, this old mantra may well have been significantly eroded by the entry into effect of the Treaty of Lisbon,⁸³ which granted binding force to the EU Charter of Fundamental Rights⁸⁴ and, in particular, to the rights to good administration (Art 41)⁸⁵ and to an effective remedy and to a fair trial (Art 47).⁸⁶ Any attempt to transfer the pre-Lisbon ‘no protection of legitimate expectations in State aid law’ paradigm to the post-Lisbon, post GBER paradigm is problematic. The Commission may be tempted to insist that nothing has changed and that, consequently, arguments of legal certainty cannot restrict its ability to dis-apply BER coverage *ex post*. That would push the old mantra to its extremes and, in my view, would break it. Relatively recent clarifications by the CJEU have tried to establish a balance, whereby recipients of State aid cannot claim legitimate expectations protection if, being diligent, they should have been capable of determining whether or not the EU procedure leading to the award of the aid was complied with or not.⁸⁷ Thus, the argument ultimately rests on the observability of the Commission’s *ex ante* intervention or the absence of such mandatory intervention, where prescribed by EU law (*ie* Arts 107 and 108 TFEU). In the case of BER protection, this is highly problematic because the restriction of any substantive analysis by the Commission to an *ex post* phase by necessity requires the recipient to rely on the Member States’ assessment of the BER. As the CJEU has also clarified, ‘a person may not plead breach of the principle of the protection of legitimate expectations unless he has been given precise assurances by the competent authority’.⁸⁸ *A contrario*, such assurances by the Member State as a co-enforcer of EU State aid law in the new post 2014 GBER paradigm may well trigger significant levels of protection of those legitimate expectations.⁸⁹ It is submitted, this is likely to increase the weight given to arguments based on legitimate expectations and legal certainty, particularly in the case of attempts to withdraw BER coverage based on a Commission’s *ex post* assessment that runs contrary to arguments of reasonable reliance (by recipients) on Member State-supported interpretations of the applicable BER,⁹⁰ particularly if it derives from a stricter interpretation of the EU State aid

⁸² See T Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford, OUP, 2006, repr. 2009) 296; W Weiß and M Haberkamm, “Legitimate expectations in state aid and the CFI” (2010) 9(2) *EStAL* 537; A Winckler and FC Lapr v te, “Reconciling legal certainty, legitimate expectations, equal treatment and the prohibition of state aids” (2011) 10(2) *EStAL* 321-326.

⁸³ Similarly, see E Fink, “The Possibility of Protection of Legitimate Expectations in Recovery of Unlawful State Aid” (2013) 1 *Juridica International* 133-141.

⁸⁴ Charter of Fundamental Rights of the European Union [2010] OJ C 83/389. The specific reasons for this assessment exceed the scope of this paper. For discussion, see R Luja, “Does the Modernisation of State Aid Control Put Legal Certainty and Simplicity at Risk” (2012) *EStAL* 765-66.

⁸⁵ P Craig, “Article 41 – Right to Good Administration”, in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart, 2014) 1069-98.

⁸⁶ P Aalto et al, “Article 47 – Right to an Effective Remedy and to a Fair Trial”, in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart, 2014) 1197-275.

⁸⁷ Fink (n 83) 136, with reference to *France T l com v Commission*, C-81/10 P, EU:C:2011:811, para 59.

⁸⁸ *AJD Tuna*, C-221/09, EU:C:2011:153, para 72; *Agrargenossenschaft Neuzelle*, C-545/11, EU:C:2013:169, para 25.

⁸⁹ At least, where the interpretation by the Member State was reasonable, in line with the original case law in the area of State liability as per *The Queen v H.M. Treasury, ex parte British Telecommunications*, C-392/93, EU:C:1996:131, para 43 in particular.

⁹⁰ The situation is not completely different to that of reliance on legal advisors’ advice, which could erode the argument by reference to *Schenker & Co. and Others*, C-681/11, EU:C:2013:404. However, this is clearly a controversial area of EU procedural law that requires future developments. In my view, a new wave of protection

rules.⁹¹ These arguments, or at least litigation based on these arguments, can add more layers of ineffectiveness to the post 2014 GBER paradigm based on more withdrawal procedures.

Consequently, either the lack of substantive analysis is an accepted feature of the new system—in which case a rate of non- or defective compliance of 30%+ of cases will only create a vicious circle of less and less material compliance with the 2014 GBER—or the Commission has substituted an *ex ante* authorisation for an *ex post* withdrawal procedure for no good reason. Moreover, this back-loading of the Commission’s intervention in the enforcement of State aid is not only a feature derived from the generosity (and institutional design) of the 2014 GBER, but a more broad approach underlying the SAM strategy. This is clearly seen when it comes to certain aspects of the notion of State aid, particularly as ‘effect on trade’ is concerned, where the Commission is taking steps towards limiting the scope of application of State aid rules, particularly when it comes to “purely local” interventions, generally linked to the provision of public services or services of general economic interest (as discussed below).

3.2. *Light-touch approach to determining (absence of) cross-border effects of “purely local” State aid measures, particularly for services of general economic interest*⁹²

The Commission is further boosting the prioritisation effort underlying the generosity of the 2014 GBER (*ie* the limited *ex ante* assessment it is prepared to engage with in the vast majority of cases) by means of some aspects of the proposed *Communication on the concept of aid*,⁹³ which adoption has however been delayed.⁹⁴ In the 2014 draft, the Commission followed the existing case law on the determination of cross-border effects,⁹⁵ and generally adopted a rather broad approach to determining the existence of effect on trade derived from State aid measures. The draft *Communication on the concept of aid* established clearly that public support “*can be considered capable to affect intra-EU trade even if the recipient is not directly involved in cross-border trade*” (para 192) and that “[e]ven a public subsidy granted to an undertaking which provides only local or regional services and does not provide any services outside its State of origin may nonetheless have an effect on trade between Member States where undertakings from other Member States might provide such services (also through the right of establishment) and this possibility is not merely hypothetical” (para 193).

of legitimate expectations can be expected, particularly where domestic constitutional principles of protection of legitimate expectations as part of the right to good administration are engaged. For discussion, see R Bousta, 'Who Said There is a 'Right to Good Administration'? A Critical Analysis of Article 41 of the Charter of Fundamental Rights of the European Union' (2013) 19(3) *European Public Law* 481-488.

⁹¹ Fink (n 83) 139, with reference to *Alcoa Trasformazioni v Commission*, C-194/09 P, EU:C:2011:497.

⁹² Quigley (n 33) 39.

⁹³ Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, 17 January 2014, ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf. See A Biondi, JL Buendia Sierra, GM Galletti and OA Stefan, *Comments on the Draft Commission Notice on the Notion of State Aid Pursuant to Article 107 (1) TFEU* (April 24, 2014), ssrn.com/abstract=2428771.

⁹⁴ As indicated by Commissioner Vestager in December 2014 (n 3), “As for the *Communication on the Notion of Aid*, the one piece of the SAM which has not yet been adopted, I have decided to take a moment for reflection at the start of my mandate. This document is too important for us to rush into a decision. But once I have had the chance to better assess where the limits of State aid control are, I intend to propose a *Communication ...*”

⁹⁵ K Bacon (ed), *European Union Law of State aid*, 2nd edn (Oxford, OUP, 2013) 82-87. See also FG Wishlade, and R Michie, *Pandora's box and the Delphic oracle: EU cohesion policy and state aid compliance* 9 (2009) strathprints.strath.ac.uk/id/eprint/15969.

This was the general approach followed in the 2011/12 revision of the State aid rules applicable to *services of general economic interest* (SGEI),⁹⁶ where the Commission made quite an effort to justify the coverage of State aid to “purely local” SGEIs,⁹⁷ and generally presented the package as introducing “*a diversified and proportionate approach with simpler rules for SGEIs that are small, local in scope or pursue a social objective*”—which, in my view, clearly indicates that public services that are “local in scope” are covered by EU State aid rules.⁹⁸ The final position was not very clear, though, as the *SGEI Compensation Communication*⁹⁹ included relatively contradictory statements without providing a clear view on how the Commission would strike a balance in concrete cases. Specifically, the *SGEI Compensation Communication* stressed that:

According to the case-law of the Court of Justice, there is no threshold or percentage below which trade between Member States can be regarded as not having been affected. The relatively small amount of aid or the relatively small size of the recipient undertaking does not *a priori* mean that trade between Member States may not be affected ... On the other hand, the Commission has in several cases concluded that activities had a purely local character and did not affect trade between Member States.¹⁰⁰

Beyond the *SGEI Compensation Communication*, in its *2013 SGEI State aid Guide*,¹⁰¹ the Commission provided some further elaboration on the need to reach a balance, but it kept the general approach that, as a matter of principle, there was no automatic exemption for SGEIs that are “local in scope”:

In the field of State Aid law, the effect on trade does not depend on the local or regional character of the service supplied, or on the scale of the activity concerned. The relatively small amount of aid provided or the relatively small size of the entity which receives it do not in themselves rule out the possibility that trade between Member States might be affected ... Even if an operator providing a specific SGEI (as in the case of specialised medical care or ambulance services) is the only operator within a region or local community because there are no others there, this does not rule out the possibility of operators from other Member States being interested in providing the SGEI in question. This means that one cannot rule out

⁹⁶ A Sinnaeve, “What's New in SGEI in 2012 – An Overview of the Commission's SGEI Package 2012” (2012) *ESTAL* 347. See also A Sanchez Graells, “The Commission’s Modernization Agenda for Procurement and SGEI”, in E Szyszczak & J van de Gronden (eds) *Financing Services of General Economic Interest: Reform and Modernization, Legal Issues of Services of General Interest Series* (The Hague, TMC Asser Press / Springer, 2012) 161-81.

⁹⁷ The issue of support for “purely local” services such as this, with the aim of excluding them from the SGEI framework, was raised in the political debate leading to the 2012 SGEI package. However, coverage of these “purely local” services was a constraint of the “objective” definition of State aid that the Commission felt it could not side-step; see TM Rusche, “The Almunia Package: Legal Constraints, Policy Procedures, and Political Choices”, in E Szyszczak & J van de Gronden (eds) *Financing Services of General Economic Interest: Reform and Modernization, Legal Issues of Services of General Interest Series* (The Hague, TMC Asser Press / Springer, 2012) 99, 115. It seems that the Commission is now changing tack and emphasising the gap it is willing to create for these “purely local interventions”, at least in terms of State aid control.

⁹⁸ European Commission, Press release IP/11/1571, “State aid: Commission adopts new rules on services of general economic interest (SGEI)”, 20 December 2011. europa.eu/rapid/press-release_IP-11-1571_en.htm.

⁹⁹ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C 8/4.

¹⁰⁰ *SGEI Compensation Communication* (n 99) paras 39-40.

¹⁰¹ Commission Staff Working Document, *Guide on the application of the EU rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*, SWD(2013) 53 final/2 (the *2013 SGEI State aid Guide*), ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf

the possibility of there being a potential impact on trade between Member States. Moreover, the regional operator could be active or plan to operate in other regions.¹⁰²

The Commission also indicated that “*on the basis of its own experience [it had] established ceilings up to which it believes that aid will not affect trade or competition*” and referred to the *SGEI de minimis* regulation¹⁰³ and the general *de minimis* regulation¹⁰⁴ as counter-balances to such a broad approach towards the identification of (potential) effect on trade derived from State aid to SGEIs. Consequently, it would seem that local services that cannot affect intra-EU trade would generally be entitled to support below the *SGEI de minimis* threshold of 500,000 Euro over any period of three fiscal years [Art 2(2) Reg 360/2012] and that, beyond that threshold, the amount of aid (or the value of the SGEI) would be deemed to trigger cross-border (potential) interest. In line with the remarks of the *SGEI Compensation Communication*, the Commission also included “examples of local SGEIs which do not really seem to affect trade between Member States” in the *2013 SGEI State aid Guide*,¹⁰⁵ but it did not go beyond including a list of cases where it decided that there was no effect on trade due to the local character of the service supported by State aid. It did not clarify how to distinguish not covered services from *de minimis* exempted ones.

The Commission now seems to be changing tack, at least rhetorically, in order to create more space for “purely local interventions” (in line with its general aim to “*bigger and more ambitious on big things, and smaller and more modest on small things*”, see above §1). In the draft *Communication on the concept of aid*, and regardless of the general approach mentioned above, the Commission revisits the cases of “local SGEIs which do not really seem to affect trade between Member States” and moves away from considering them as relatively isolated cases towards the creation of a *general category* of exempted (rectius, not covered) interventions, or a new ‘general exception’ to the application of EU State aid rules.¹⁰⁶ Indeed, in this latter document, the Commission takes the view that, in accordance with the CJEU case law, such services can in particular circumstances be regarded as not coming within the scope of Article 107(1) TFEU. In that regard, the Commission recasts three conditions that it considers to emerge from the decisional practice underlying those cases and that allow it to determine that, due to their specific circumstances, certain activities do not affect trade between Member States. Those conditions are that: (a) the aid does not lead to demand or investments being attracted to the region concerned and does not create obstacles to the establishment of undertakings from other Member States; (b) the goods or services produced by the beneficiary

¹⁰² *2013 SGEI State aid Guide* (n 101) 36-37.

¹⁰³ Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest [2012] OJ L 114/8.

¹⁰⁴ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid [2013] OJ L 352/1.

¹⁰⁵ *2013 SGEI State aid Guide* (n 101) 37-38.

¹⁰⁶ A similar development can be identified in the reinterpretation or redefinition of certain other elements of the notion of State aid, such as selectivity. See P Nicolaides, “New Limits to the Concept of Selectivity: The Birth of a ‘General Exception’ to the Prohibition of State Aid in EU Competition Law” (2015) 6(5) *Journal of European Competition Law & Practice* 315-23.

are purely local or have a geographically limited attraction zone; and (c) there is at most a marginal effect on the markets and on consumers in neighbouring Member States.¹⁰⁷

In my view, this approach implicitly indicates that the Commission considers the existing *de minimis* regimes (both general and for SGEIs) insufficient to cover all “purely local interventions”. However, it has not made this explicit and the inadequacy of the existing framework for SGEI support when it comes to purely local interventions remains unclear—in particular in the case of State aid to providers of local healthcare or social services, which can easily be defined as services of general interest (either of an economic or non-economic nature, depending on the case)¹⁰⁸ and, hence, be covered by those sectoral State aid rules. As a result, blurring the boundaries of the notion of State aid at a conceptual level through such an exemption for “purely local interventions” creates uncertainty as to the limits and scope of application of specific State aid regimes (in particular, the rules applicable to SGEI support) and muddles the legal framework applicable to sponsorship of local public services.

Even if the draft *Communication on the concept of aid* is still susceptible to change prior to its delayed approval, the Commission has already been using the “purely local intervention exemption” rather generously. Indeed, framing it as an additional effort to clarify to Member States that certain types of economic interventions do not require *ex ante* assessment despite not being covered by the 2014 GBER, the Commission has recently ‘packaged’ seven of its Decisions and used them to stress that in cases where support is granted to “*an activity which has a purely local impact*” and which has “*no – or at most marginal – foreseeable effects on cross-border investments in the sector or the establishment of firms within the EU's Single Market*”, the measure is deemed not to have an effect on trade “*e.g. where the beneficiary supplies goods or services to a limited area within a Member State and is unlikely to attract customers from other Member States*”.¹⁰⁹ This can be seen to create an implicit test of “significant probability” of effect on cross-border trade that deviates from the ‘standard’ approach discussed above for “purely local State aid interventions”. Those decisions concerned healthcare; sports services; information, advisory and consultancy services to interested individuals, newly created firms and SMEs; as well as the expansion of port facilities. Almost all of them could have been covered by the SGEIs rules.

Moreover, in some specific cases, the lack of clarity in the Commission’s approach to “purely local interventions” also creates a clash between State aid rules and other tools of EU economic law, such as public procurement law,¹¹⁰ which I consider an unwelcome development. This creates the same problems of *ex post* loading of the Commission’s intervention discussed in relation with the 2014 GBER, particularly when one considers cases where the Member States may misapply the still emerging “purely local intervention” exemption by considering that there is no “significant probability” of an effect on trade and the Commission disagrees with that assessment (either *motu proprio*, or as a result of a complaint). In those cases, the intervention of the Commission also comes too late and reliance on the

¹⁰⁷ Draft *Communication on the concept of aid* (n 93) para 196.

¹⁰⁸ See W Sauter, *Public services in EU law* (Cambridge, CUP, 2014) 84-109.

¹⁰⁹ Commission, press release IP/15/4889 (n 72).

¹¹⁰ This is a point that exceeds the possibilities of the paper, and that I will develop in a separate article soon.

interpretation of such unclear *soft law* regarding the coverage of “purely local interventions” is bound to create legal uncertainty and litigation.¹¹¹

All of these difficulties somehow result from the Commission’s need to free up enforcement resources in order to cope with the volume of activity that State aid enforcement requires (above §2). However, the SAM paradigm does not really allow the Commission to muster additional enforcement resources through the cooperation of third (private) parties. Consequently, the risks of increased *ex post* litigation derived from misapplication of the 2014 GBER or the emerging “purely local intervention exemption” make it unlikely that State aid can actually be revitalised, as the Commission is mainly shifting workload from *ex ante* substantive assessment to *ex post* evaluation or, worse, detection of infringements—but the total volume of work resulting from State aid enforcement is not reduced, except if it is assumed that, generally, the level of post-crisis enforcement effectiveness will be necessarily reduced. The issue of insufficient capacity to monitor and ensure State aid compliance under SAM is now discussed in more detail.

3.3. Lack of capacity to monitor and ensure compliance with State aid rules in an effective manner, regardless of increased transparency obligations; in part due to a more restrictive approach to the locus standi to submit complaints to the Commission after SAM

The inability of the Commission to cope with the workload derived from the existing State aid instruments is implicitly recognised, or simply evident, from the reliance on *transparency* as a pillar of SAM,¹¹² and the hope for civil society/private parties’ complaints and challenges to develop as a basic check and balance within the SAM paradigm on the basis of increased transparency and publicly-available information. Under Article 9 of the 2014 GBER, all aid awards above 500,000 Euros will have to be published on national or regional websites, at the latest as from 1 July 2016.¹¹³ According to the *SAM Communication on transparency*,¹¹⁴ which provides some background for these publication and information requirements,

Transparency in relation to aid awards is a key component of the modernisation ... In the area of State aid, transparency is even more important. Transparency promotes compliance, reduces uncertainties and enables companies to check whether aid granted to competitors is legal. It promotes a level playing field across Member States and companies in the internal market, which is even more important in the present economic context. It facilitates enforcement for national and regional authorities by increasing awareness of aid granted at various levels, hence ensuring better control and follow-up at national and local levels. Finally, better transparency makes it possible to reduce reporting obligations and the administrative burden linked to reporting.

To ensure transparency, Member States shall, as a condition for granting aid ... in line with the relevant guidelines, establish comprehensive State aid websites, at regional or national level, for the publication of information on aid measures and their beneficiaries. Following standard practice regarding publication of information, a standard format shall be used which allows the information to be easily published on

¹¹¹ For background, see OA Stefan, *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union*, 81 European Monographs (Alphen aan den Rijn, Wolters Kluwer Law & Business, 2012).

¹¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on *EU State aid Modernisation*, COM(2012)209.

¹¹³ For a critical view, T Jaeger, “State Aid and Transparency: A Natural Contradiction” (2014) *EStAL* 386.

¹¹⁴ *Communication from the Commission to increase transparency of State aid awards*, C(2014)3349/2, 21.05.2014, ec.europa.eu/competition/state_aid/modernisation/state_aid_transparency_en.pdf.

the Internet, searched and downloaded. The transparency requirement applies in general to all State aid, except for smaller aid awards of less than EUR 500.000.

The ultimate goal of this increased transparency is thus to prompt private (and public) agents to monitor State aid activity and take action in case of infringement of EU law. In my view, this is utopian and a very limited number of challenges or complaints can be expected from this increased transparency. ‘Truly’ interested parties, such as direct competitors or trade organisations were already able to identify and report potential breaches of EU State aid law as part of their regular activities,¹¹⁵ and the problems they had to push their cases forward rarely related to lack of access to public information before filing a complaint, but rather depended on their ability to persuade the Commission to formally open investigation procedures.¹¹⁶ In any case, the transparency added by SAM will only facilitate complaints by these parties in a marginal way, given that public information resulting from the SAM publication obligations will always be limited. Moreover, given the simultaneous introduction of the mandatory use of a standardised complaints form that requires complainants to provide the Commission with a significant amount of information, the complaints bar is raised,¹¹⁷ which makes it difficult to accept that SAM will result in a higher number of complaints by interested parties.

On their part, ‘non-truly’ interested parties, or the public in general, simply have no skills, incentives or good reasons to become stewards of State aid compliance. It is very hard to identify any significant way in which increased transparency will have the effect of actually enhancing the information received by the Commission,¹¹⁸ given the highly technical nature of State aid rules and the *rational apathy* of private citizens and uninterested parties.¹¹⁹ Consequently, the discourse on transparency as an enabling mechanism for an informed citizenship to take action is, in my view, a pointless gesture. And one that does not come without costs, since the publication and information obligations derived from Article 9 of the 2014 GBER raise the bureaucratic burden imposed on Member States’ authorities responsible for State aid. Hence, the overall effect of this increased transparency in State aid awards seems unlikely to be positive.

Interestingly, this is not a trend that exclusively affects State aid enforcement, but a *malaise* that is pervading other areas of EU economic law, such as public procurement.¹²⁰

¹¹⁵ According to former Commissioner Almunia, the Commission is asked to review an average of around 350 complaints every year. Speech/11/291 “Staying ahead of the curve in EU competition policy” at GCLC’s Fifth Evening Policy Talk, 19 April 2011, europa.eu/rapid/press-release_SPEECH-11-291_en.htm.

¹¹⁶ At least, this is what anecdotal evidence shows. See M Martinez Navarro, “The Ombudsman Decision on the State-aid Complaint Concerning Certain Spanish Football Clubs: The Ombudsman as an Alternative Route for State-aid and Anti-Trust Complainants?” (2015) 6(2) *Journal of European Competition Law & Practice* 99-101.

¹¹⁷ This was a change announced both officially and unofficially by the European Commission. See E Cabrera Maqueda, “Commission v Ryanair: in the Field of State Aid, Complaints are not Subject to Formal Requirements (for now)” (2013) 4(5) *Journal of European Competition Law & Practice* 423-25.

¹¹⁸ European Commission, Press release IP/14/404, “State aid: Commission streamlines handling of state aid complaints”, 9 April 2014. europa.eu/rapid/press-release_IP-14-404_en.htm.

¹¹⁹ The term was coined in the context of shareholder activism and oversight of corporate activity; see RC Clark, *Corporate Law* (Boston, Little & Brown, 1986) 390-92. For extended discussion, see JC Coffee Jr, “Litigation Governance: Taking Accountability Seriously” (2010) 110 *Columbia Law Review* 288-351.

¹²⁰ A Sanchez Graells, “The Difficult Balance between Transparency and Competition in Public Procurement: Some Recent Trends in the Case Law of the European Courts and a Look at the New Directives” (2013). *University of Leicester School of Law Research Paper No. 13-11*, ssrn.com/abstract=2353005.

However, the flaws of the SAM seem especially acute, particularly upon a closer look at the coordination of the transparency requirements foreseen in Article 9 of the 2014 GBER¹²¹ with the renewed State aid procedural rules of Regulation 734/2013¹²² and Commission Regulation 372/2014.¹²³ Under the revised rules of Article 11a of Regulation 794/2004,¹²⁴ any person submitting a complaint shall demonstrate that it is an ‘interested party’ within the meaning of Article 1(h) of Regulation 659/1999. Previously, there was no requirement whatsoever regarding the legal position of a complainant, and Article 10(1) of Regulation 659/1999 simply established that “[w]here the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay” (emphasis added). The reference to “whatever source” indicated that the ability to complain was basically unlimited. Conversely, by imposing the requirement that “[a]ny person submitting a complaint pursuant to [Article 10(1) of Regulation 659/1999] shall demonstrate that it is an interested party within the meaning of Article 1(h) of that Regulation” (emphasis added), Regulation 734/2013 has created a very significant limitation on the ability to submit valid complaints. Particularly, because the concept of “interested party” is actually rather restrictive. At first reading, it covers “any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations” (emphasis added),¹²⁵ which could have been constructed in broad terms. However, this has been the object of a very narrow interpretation in recent case law of the General Court, in particular, in *Sarc v Commission*, where active standing to complain was rejected on the basis that the complainant had not “established that its competitive position was significantly affected within the meaning of the case-law” (emphasis added), which is certainly very restrictive.¹²⁶ Given the limited ability to validly complain to the Commission that results from these modified rules on standing, the actual effect of the increased transparency obligations of Article 9 of the 2014 GBER on the likelihood of (admissible) complaints to the Commission cannot be seen as positive.

Such restrictive approach should be understood in the context of the strengthened obligations that the CJEU has imposed on the Commission in terms of a duty to investigate and

¹²¹ See European Commission, “State aid Transparency for taxpayers” (2014) 4 *Competition policy brief* 1.

¹²² Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L 204/15.

¹²³ Commission Regulation (EU) No 372/2014 of 9 April 2014 amending Regulation (EC) No 794/2004 as regards the calculation of certain time limits, the handling of complaints, and the identification and protection of confidential information [2014] OJ L 109/14.

¹²⁴ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2004] OJ L 140/1, as amended by Regulation 734/2013.

¹²⁵ Generally, for discussion of the reform, see PY Dilkova, “The new procedural regulation in state aid - whether “modernisation” is in the right direction?” (2014) 35(2) *European Competition Law Review* 88-91.

¹²⁶ *Sarc v Commission*, T-488/11, EU:T:2014:441 para 45. For critical remarks, see A Sanchez Graells, “State aid and (university) software licensing: who’s interested? (T-488/11)”, *howtocrackanut*, 12 June 2014, howtocrackanut.blogspot.co.uk/2014/06/state-aid-and-university-software.html. For extended discussion on rules on active standing for these purposes, see E Gambaro, “Locus standi of natural and legal persons before the European Courts in State aid cases”, in M Marquis and R Cisotta, *Litigation and Arbitration in EU Competition Law* (Cheltenham, Edgar Elgar, 2015) 201-23; and F Pastor Merchante, “On the Rules of Standing to Challenge State Aid Decisions Adopted at the End of the Preliminary Phase” (2012) 11(3) *EStAL* 601-10.

adopt formal decisions for each complaint it receives in State aid cases.¹²⁷ Hence, the restriction of the *locus standi* to submit complaints to the Commission after SAM seems to be an integral part of its strategy to regain control over its State aid enforcement docket, as the Commission does not want to find itself in a position where it formally has to conduct an investigation and issue a decision for each complaint it receives. However, in view of this clear restriction of the ability of private sector parties and civil society in general to challenge State aid decisions, it is simply wishful thinking, if not misleading, to present the increased obligations of transparency discussed above as a boost for more private-sector input to the Commission for the purposes of State aid monitoring under the SAM paradigm. The Commission cannot have its cake and eat it too. A limited *locus standi* for the submission of complaints will deactivate any expected increase in complaints as a result of increased transparency, which then becomes useless, expensive red tape.

3.4. Overall assessment

For the reasons discussed so far, in my view, the Commission cannot expect to revitalise State aid enforcement in the SAM paradigm to any significant degree. It does not have the resources needed to oversee the system in an enlarged EU28 and a post-crisis scenario where State aid is still very closely subjected to strategies to prompt economic recovery. Despite the increased transparency that it has imposed on Member States as a compliance requirement under the 2014 GBER and other SAM instruments, such transparency will not result in the expansion of the basis of private agents engaged in State aid monitoring or surveillance in any meaningful way. Not least because the Commission has intentionally limited its role to an *ex post* supervision of the vast majority (if not the practical totality) of State aid cases (with a few exceptions for high profile, high budget and difficult cases), and has effectively restricted (if not fundamentally excluded) the possibility for complainants to force an earlier intervention based on a complaint. Consequently, SAM has not responded to the need for procedural reform that a truly effective *State aid control 2.0* would require. The following section explores alternative developments based on the abolition of the Commission's enforcement monopoly of Article 108(3) TFEU.

4. What if the Commission gave up the enforcement monopoly over Art 108(3) TFEU?

An 'out of the hole' possibility to revitalise State aid enforcement in the post-crisis scenario would be to try to sort out the problem of the limited decision-making resources available to the Commission. An obvious alternative would be to make even further investments on human resources assigned to the Commission's State aid task force. And a second rather immediate

¹²⁷ *Commission v Ryanair*, C-615/11, EU:C:2013:310. For extensive discussion, see F Pastor Merchante, *The Role of Competitors in the Enforcement of State Aid Law* (PhD Thesis, European University Institute, 2014) *on file with author*. See also *Athinaiki Techniki AE v Commission*, C-521/06, EU:C:2008:422. See M Merola and L Armati, "Complainants' Rights in State Aid Matters: Lost in Modernisation?" (2013) *GCLC Working Paper* 01/13, coleurope.eu/website/research/global-competition-law-centre/working-papers; Sara Poli, "The Legal Standing of Private Parties in the Area of State Aids after the Appeal in *Commission v. Kronoply/Kronotex*" (2012) 39(3) *Legal Issues of Economic Integration* 357-79; and E Gambaro and F Mazzocchi, "Case C-521/06 P, *AthinaikiTechniki v. Commission*" (2011) 48 *CMLRev* 2083-106, 2011. See also A Sanchez Graells, "CJEU does not tolerate a slacker EU Commission in State aid control (C-615/11): Commission counter-attacks with 'case management' excuses", *howtocrackanut*, 16 May 2013, howtocrackanut.blogspot.co.uk/2013/05/cjeu-does-not-tolerate-slacker.html.

option, or a complement, would be to involve the national competition authorities (NCAs) in screening and supporting State aid control, but without allowing them to make final decisions on the compatibility of State aid with Article 107 TFEU.¹²⁸ Both of these options have problems and difficulties. The first one, because resources are not unlimited and it is hard to estimate the optimal size of the State aid task force relative to the effectiveness of the enforcement of State aid rules in the EU. The second option (*ie* involving NCAs in monitoring, but with no decision-making powers) would have the same issues, with the only difference that the budget that would fund the expansion of manpower would be that of the Member States. In any case, the option of making DG COMP simply bigger (with, or without the NCAs) does not seem particularly useful because, in my view, the biggest problem derives from the centralised nature of the State aid enforcement system—which could only be overcome if the Commission gave up the enforcement monopoly over Art 108(3) TFEU.¹²⁹

A truly decentralised system of State aid enforcement would, of course, be no panacea, and it would create three groups of issues related to enforcement of State aid by the NCAs (with full decision-making powers), other public authorities of the Member States, and/or the courts. The enforcement of State aid rules by NCAs, which would complete a decentralisation process already initiated in the 2005-2009 State Aid Action Plan,¹³⁰ creates a problem of actual independence of these competition watchdogs and a strain of their institutional robustness that does not seem to make it a sensible policy option.¹³¹ Similar issues arise when other public authorities of the Member States (such as courts of auditors or other oversight bodies) are concerned. Hence, it is worthwhile to focus on the potential expansion of judicial enforcement of EU State aid rules.¹³²

As is well known, the courts of the Member States already play a significant role in the enforcement of State aid rules, particularly when it comes to adopting interim measures against the disbursement of illegal State aid and the recovery of illegal and unlawful aid.¹³³ The question is whether having full decision-making powers for the enforcement of the EU State

¹²⁸ See Buts, Joris and Jegers (n 56) 336-40.

¹²⁹ Generally, see P Nicolaides, “Decentralised State Aid Control in an Enlarged European Union: Feasible, Necessary or Both?” (2003) 26(2) *World Competition* 263-76.

¹³⁰ E Brunsson, *The Reforms of the European State Aid Control – decentralisation as a new form of governance?* (LLM Dissertation, Faculty of Law, University of Lund, 2009) 56, lup.lub.lu.se/luur/download?func=downloadFile&recordId=1556544&fileId=1564024.

¹³¹ The problem of independence is acknowledged by Buts, Joris and Jegers (n 56) 336. *Cfr* N Fiedziuk, “Towards Decentralization of State Aid Control: The Case of Services of General Economic Interest” (2013) 36(3) *World Competition* 387-408. Regarding the situation in EU candidate countries, see M Botta, “State Aid Control in South-East Europe; the Endless Transition” (2013) 11(1) *EStAL* 85-96.

¹³² For some discussion linked to the enforcement before public procurement courts and review authorities, see GS Ølykke, “The Legal Basis Which Will (Probably) Never Be Used: Enforcement of State Aid Law in a Public Procurement Context” (2011) 10(2) *EStAL* 457-66.

; and A Sanchez Graells, “Enforcement of State Aid Rules for Services of General Economic Interest before Public Procurement Review Bodies and Courts” (2014) 10(1) *Competition Law Review* 3-34.

¹³³ Commission notice on the enforcement of State aid law by national courts [2009] OJ C 85/1. For discussion, see C Kaoutzanis “Commission Notice on the Enforcement of State Aid Law by National Courts” (2009) 16 *Columbia Journal of European Law* 7. See also A Knade-Plaskacz “Enforcement of State Aid Law at National Level - The Relationship between National Courts and the European Commission” (2013) 3 *Juridical Trib.* 116; and PC Adriaanse, “Appropriate Measures to Remedy the Consequences of Unlawful State Aid” (2009) 2(1) *Review of European Administrative Law* 73-86.

aid rules, which is a scenario already being pushed for in the case law of the CJEU on the basis of the duty to ensure the *effectiveness* of the State aid prohibition in Article 107(1) TFEU,¹³⁴ would improve the general effectiveness of State aid law controls. In this regard, it is worth stressing that the acquisition of full decision-making powers would be a relatively marginal change after the CJEU has already indicated that national courts are under a general obligation to refer questions of interpretation of Article 107(1) TFEU, regardless of the existence of a parallel enforcement procedure by the Commission. Indeed,

Where [national courts] entertain doubts as to whether the measure at issue constitutes State aid within the meaning of Article 107(1) TFEU or as to the validity or interpretation of the decision [of the Commission] to initiate the formal examination procedure, national courts may seek clarification from the Commission and, in accordance with the second and third paragraphs of Article 267 TFEU, as interpreted by the Court, they may or must refer a question to the Court for a preliminary ruling.¹³⁵

Hence, in my view, the question is not whether further State aid law decentralisation should be carried out, but whether there is any reason not to do so. Granted, judicial application of State aid rules will be problematic and difficult and one could wonder whether it would be a worthwhile policy option if the system was completely inexistent. But the system is currently in place and the rules that control judicial application of State aid rules are underdeveloped and not fit for purpose. In particular, the current situation is not conducive to the proper enforcement of EU State aid rules due to the uncertainty that arises concerning rules on active standing (should they be the same as before the Commission or should domestic rules prevail, on the basis of the general principle of national procedural autonomy?); burden of proof; evidentiary value of Commission decisions (in case there are any previous findings that the domestic court does not wish to challenge by means of a request for a preliminary ruling); (im)possibility to ask the Commission to intervene as *amicus curiae* in State aid cases; interim measures, etc. However, in my view, the biggest problem that currently exists and that can significantly complicate State aid enforcement (in high-profile cases) is the open possibility of parallel enforcement procedures at national and EU level. Consequently, there is at least one good reason to fully decentralise the enforcement of Article 108(3) TFEU and suppress the enforcement monopoly that the Commission still holds: it would allow for the creation of a coordination mechanism similar to that in Article 15 of Regulation 1/2003, although it would need to be more definitive in terms of mandatory suspension of parallel procedures.¹³⁶

Given the reasons indicated above (§3) concerning the lack of incentives of third parties and the limited remedies that infringements of EU State aid rules carry with them, in my view, such decentralisation may well not result in a significant increase of judicial private enforcement. It is unclear that parties other than the beneficiary of State aid or very direct competitors (depending on the litigation scenario) will ever be able to prove that they are entitled to damages due to the State's infringement of EU law.¹³⁷ And, even then, the

¹³⁴ See Lübbig and Morgan (n 43).

¹³⁵ *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, para 44 (emphasis added). See also P de Bandt, "Lufthansa: a new era for State aid enforcement?" (2014) 5(4) *Journal of European Competition Law & Practice* 206-07.

¹³⁶ See Dilkova (n 125) 90-91.

¹³⁷ Generally, see T Lock, "Is private enforcement of EU law through State liability a myth? An assessment 20 years after Francovich" (2012) 49(5) *CMLRev* 1675-702.

effectiveness of EU law may well exclude them.¹³⁸ Consequently, judicial enforcement of EU State aid rules will most likely not result in a revitalised system that can contribute to their effectiveness in the post-crisis scenario resulting from SAM. However, the advantage of that judicial decentralisation would derive from the avoidance of difficult cases of judicial layering resulting from parallel State aid procedures originating in a single measure—which could well infringe basic procedural rights derived from the duty of good administration and/or basic due process guarantees, as currently interpreted.¹³⁹

5. Conclusion

This paper has shown that the Commission's reaction to the economic crisis and the effects of the ensuing temporary rules created a significant risk of diminished effectiveness of State aid control in the EU. The Commission tried to avoid that risk by embarking in the State Aid Modernisation process (SAM) in 2012. However, as a result of the substantive and procedural changes derived therefrom, it is my view that the Commission has actually prompted the realisation of such risk and, ultimately, that State aid under the SAM paradigm will necessary remain at levels of effectiveness well below the pre-crisis standard.

The *de facto* adoption of a system of *ex post* intervention by the Commission by means of the 2014 GBER has altered the balance of responsibilities and powers between the Commission and the Member States. The Commission now finds itself in a scenario where, other than for very large projects, its role is almost exclusively limited to procedures for the withdrawal of block exemption benefits and/or the investigation of Member States for serious infringements of EU State aid law. The post-crisis system has excessive tolerance towards Member States' strategic or simply erroneous behaviour and the Commission lacks the necessary resources to ensure proper oversight and enforcement. Despite the increased transparency that comes with SAM, there will not be a significant increase of complaints validly submitted to the Commission due to the simultaneous restriction of the *locus standi* to complain and an increased difficulty derived from the imposition of a standard complaint form. Even the de-monopolisation of enforcement of Article 108(3) TFEU, which is necessary and should be attempted, is likely to be insufficient to spur a significant volume of private enforcement of State aid law because the incentives are different than those derived from infringements of the *antitrust* rules.

Consequently, overall, I do not think the Commission can dig itself out of the hole where the enforcement of the EU State aid rules has ended up as a result of the crisis. SAM will result in more red tape and bureaucratic obligations for the Member States, particularly in terms of the mandatory transparency websites, but it will not trigger more material compliance with the EU State aid rules. There are many questions that remain open, such as whether the

¹³⁸ The issue is similar to the problems derived from compliance with arbitral awards, which is a raising problem for EU State aid law. See P Ortolani, "Intra-EU Arbitral Awards vis-à-vis Article 107 TFEU: State Aid Law as a Limit to Compliance" (2015) 6(1) *Journal of International Dispute Settlement* 118-35.

¹³⁹ In my view, those guarantees should be reduced in competition enforcement, but that is an issue that exceeds the possibilities of this paper. See A Sanchez Graells and F Marcos, "'Human Rights' Protection for Corporate Antitrust Defendants: Are We Not Going Overboard?", in P Nihoul and T Skoczny (eds), *Procedural Fairness in Competition Proceedings* (Cheltenham, Edward Elgar, 2015) 84-107, ssrn.com/abstract=2389715.

EU State aid system should be completely dismantled, or if a true modernisation or reinvention is possible. Maybe it would be preferable to simply adopt much higher *de minimis* thresholds and get rid of all block exemption regulations below those levels. Maybe it would be more effective to incorporate the receipt of public support in the analysis of the market behaviour of the beneficiaries and, in that way, implement a truly indirect control of State aid. In the end, the impact of State aid in the market may well only realise through the behaviour of the beneficiaries, so monitoring that level of competition may suffice. Of course, I would not venture answers to such complicated questions in a rush. I just hope that the simple message that SAM has not fixed the enforcement issues that threatened the future viability and long-term sustainability of the EU State aid enforcement system is persuasive.